

FOREWORD

Judicial Confirmations and the Rule of Law

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The Cato Institute's Center for Constitutional Studies is pleased to publish this 16th volume of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions from the term just ended plus a look at the term ahead—all from a classical liberal, Madisonian perspective, grounded in the nation's first principles, liberty through constitutionally limited government. We release this volume each year at Cato's annual Constitution Day conference. And each year in this space I discuss briefly a theme that seemed to emerge from the Court's term or from the larger setting in which the term unfolded.

Unlike recent terms, the Court's October Term 2016 was remarkable for being largely unremarkable. With the seat of the late Justice Antonin Scalia remaining unfilled until Justice Neil Gorsuch was sworn in on April 10, little more than two months before the term ended, the Court decided only 62 cases after argument—the fewest ever—and no decision would count as extraordinary. Hence, this slimmer than usual *Review*.

The real action during the term lay beyond the Court, with the nomination of Judge Gorsuch and the confirmation hearings before the Senate Judiciary Committee that followed. Given his stellar credentials and Tenth Circuit record, his confirmation should have been unexceptional, as most such were in earlier days. (Indeed, even in appearance and demeanor he was straight out of Central Casting.) Instead, he was confirmed with nearly half the Senate voting no—a

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party line vote with only three Democratic defections. And he endured hours of often aggressive grilling, much of it aimed at showing that he was not a “mainstream” nominee, notwithstanding that 97 percent of his 2,700 some decisions were unanimous and 99 percent of the time he was in the majority.

Ever since the brutal 1987 hearings for Judge Robert Bork, who paid the price for playing it straight—answering questions in detail, never equivocating or pretending to be someone he was not—judicial confirmation hearings have been stylized, questionably productive rituals, especially for Republican nominees. The Gorsuch hearings were no exception. Like other recent nominees of both parties, he said as little as needed to get by, and for perfectly legitimate reasons. He did not want to reveal how he might rule in future cases. More important, committing to certain positions as a condition for being confirmed would not only violate the judicial code of conduct but would be tantamount to deciding future cases in the hearings, by politics, rather than in the courtroom, by law. Indeed, in the run-up to and during the hearings, Democrats made much of the need for judicial independence of the president. Judges need also to be independent of Congress.

Meanwhile, as in other recent hearings, Democrats on and off the committee repeatedly charged Gorsuch with ruling for corporations and against workers, minorities, women, and, especially, the “little guy.” Senator Dianne Feinstein, ranking minority member on the committee, put it plainly when she asked Gorsuch: “How do we have confidence in you, that you won’t be just for the big corporations? That you will be for the little man?”

The implications of that view for the rule of law are stark. They amount to asking Lady Justice to remove her blindfold, to rule based not on the law but on who the parties are. Fortunately, and doubtless in anticipation of hearing it, committee Chairman Chuck Grassley began the hearings on just that point—fittingly, with a quote from a Scalia opinion. “It is the ‘proud boast of our democracy that we have a government of laws and not of men,’” Scalia wrote. Drawn from the Massachusetts Constitution of 1780, that is a distinction between law and politics, for when all is politics, under the rule of man, nothing is law.

When the hearings concluded, it was more clear than ever that the Senate and, by implication, the nation are deeply divided not simply

over politics but over the very meaning of the Constitution and the role of the courts under it—divisions that are far more pronounced and partisan than they've ever been. Democrats see the Constitution mostly as a "living" document, sufficiently open-ended and malleable to enable judges to "do justice"—as they see it. Republicans, by contrast, see the Constitution mainly as establishing a set of institutions, legal relationships, and rules that judges are to apply impartially in cases brought before them.

Given those starkly different views, and the implications for the rule of law, it would be useful to see how the Constitution itself contemplates the connection between politics and law. That will frame a brief look at how we got to where we are today with these confirmation hearings and a further and more important look at the substantive underpinnings of our deep divisions.

Politics and Law under the Constitution

In a limited constitutional republic like ours, the relation between politics and law is set, for the most part, by law—by the law of the Constitution. Drawing on reason and interest, the Framers drafted a constitution that became law through ratification—a *political* act that reflected the interests and will of the founding generation. Amended by subsequent acts of political will, the Constitution authorizes the political branches to act pursuant only to their enumerated powers or to enumerated ends. It further limits the exercise of those powers and the powers of the states either explicitly or by recognizing, with varying degrees of specificity, rights retained by the people. And by fairly clear implication, made explicit in the *Federalist* and shortly thereafter in *Marbury v. Madison*, the Constitution authorizes the judiciary to declare and enforce that law of authorizations and restraints consistent with the document itself.

Thus, the scope for "politics"—understood as the pursuit of individual or group interests through public or political institutions—is limited. Consistent with constitutional rules and limits, the people may act politically to fill elective offices. Those officers may in turn act politically to fill non-elective offices. But once elected or appointed, those officials may act politically only within the scope and limits set by the Constitution. In particular, in a limited republic like ours, not everything in life is meant to be subject to political or governmental determination. In fact, the founding and subsequent generations

wanted most of life to be beyond the reach of politics, yet under the rule of law. In short, our Constitution does not say, “After periodic elections, those elected may do what they will or pursue any end they wish or any end the people want.” On the contrary, it strictly limits, by law, the scope of politics. And it falls to the judiciary, the nonpolitical branch, to declare what the Constitution says that law and those limits are, thereby securing the rule of law.

The aim in all of this, then, is to constrain the rule of man—and politics—by the rule of law. The Framers understood that legitimacy begins with politics, with the people: “We the people . . . do ordain and establish this Constitution.” But once ratification—the initial political act—establishes the rule of law, that law constrains politics thereafter. And it is the nonpolitical judiciary that declares and enforces that law. It is essential, therefore, that the judiciary act nonpolitically—not from will or interest but from reason, according to law, consistent with the first principles of the system. If it does not, then to that extent the rule of law is undermined and politics trumps law.

A Brief History of How We Got Here

Against that brief outline of the Constitution’s ordering of politics and law, let us turn now to the judicial-selection process. In it, “raw” politics—the “horse-trading” we see in many areas of politics—has always played a part, and for good reason. It’s built into the Constitution. At the federal level, at least, we don’t select judges in the same way that we select civil servants. The *political* branches do the selecting: Presidents nominate and the Senate advises and consents, or not. And ultimately, of course, the selection of judges is political insofar as it rests with the people: They select the politicians who select the judges who in turn interpret and apply the constitutional provisions that empower and limit the politicians who selected them.

But while that raw politics has always been with us, it has also been supplemented from time to time with a politics animated by ideological considerations. The Gorsuch hearings revealed that clearly. For if judges, members of the *non*political branch, have a duty to say what the law is and apply it to cases before them—a principle older than *Marbury v. Madison*—then asking them to “do justice,” regardless of what the law may say, is asking them to do nothing less than undermine the rule of law. (Recall Justice Oliver Wendell Holmes’s retort when urged to “do justice”: “My job is to apply the

law.”) Yet as noted above and illustrated further below, that is exactly what Democrats on the committee often expected Judge Gorsuch to do—not in terms, of course, but in effect. To be sure, they sometimes grounded their complaints in different readings of “the law”—and Republicans too sometimes misread the law, especially concerning the Ninth and Fourteenth Amendments and how the two go together through the Constitution’s presumption of liberty. But in the main it was a repeated concern for “justice” over law that animated committee Democrats.

As mentioned above, hearings of the kind we’ve just seen were rare for most of our history. They’ve arisen mainly during the last three decades. Yet the *substantive* roots that help in part to explain them go far back. A particular but important such ground is the demise of the Fourteenth Amendment’s Privileges or Immunities Clause in the *Slaughterhouse Cases* of 1873, which most scholars today believe were wrongly decided. As a result, the authority of judges to check the power of states over their own citizens remains confused to this day. But today’s divisions arise far more broadly from the Progressive Era and its rejection of the Constitution’s limited government principles, a vision that the New Deal Court institutionalized systematically in a series of decisions between 1937 and 1943, turning the Constitution on its head.

That constitutional revolution—eviscerating the doctrine of enumerated powers, bifurcating the Bill of Rights, creating a two-tier theory of judicial review, and jettisoning the nondelegation doctrine—was essentially a *political* settlement that followed Franklin Roosevelt’s early 1937 threat to pack the Court with six new members. It set in train the modern redistributive and regulatory state, which in turn brought ever more complaints to the nation’s courts, some unrelated to government growth and long overdue, as with civil rights, but many others the product of the burgeoning public sector. With legal realism, legal positivism, and other modern theories infusing those developments, the heady idea of judges “doing justice” followed quite naturally, surfacing especially in the post-War Warren and Burger Courts.

But “justice” of that kind offended many in the slowly emerging conservative movement, not only substantively but, even more, in its reflection of what they saw as “judicial activism”—judges deciding cases based not on the law but on their own, usually liberal, values.

Thus, in the 1960s Yale's Alexander Bickel wrote broadly of judicial review's "countermajoritarian difficulty"—questioning the legitimacy, in a democracy, of judges overriding democratic decisions. Discounting the "majoritarian difficulty" that so concerned the Framers—their fear of unrestrained legislative majorities—Bickel urged judges toward the "passive virtues" and "judicial restraint," influencing in the process people like Bork, Scalia, and other conservatives. Pointing to the separation of powers, these conservatives saw judges engaged in "lawmaking," which belonged properly to the legislative branches, not to the courts. They often overstated and misstated the problem, because they focused more on judicial behavior than on the Constitution, but their brief was not unfounded.

Looking back over this stretch, liberals, as pre-New Deal progressives came to be known, had the political and legal fields largely to themselves for decades. But that would change when the Reagan revolution came along. Focusing on the courts, the administration consciously supplemented the "raw" politics of judicial selection with an ideological politics, one informed by the principles of the regnant conservative and, to a lesser extent, libertarian movements. Thus, the 1986 hearings for Justice William Rehnquist to be the chief justice and Judge Scalia to fill the Rehnquist seat were the first to draw, in a full-fledged way, the ideological opposition of the long-dominant liberal movement. The issues were thus joined. Yet both nominees were finally confirmed on Constitution Day, 1986: Rehnquist 65-33, Scalia 98-0.

Those 1986 Rehnquist/Scalia hearings mark the beginning of what would be a series of ideologically contentious judicial confirmation battles. Often focused mainly on the proper role of the courts, competing conceptions of the law were always just below the surface, and sometimes above it. It took only a year for the most brutal of those battles to unfold. Fearing that replacing retiring Justice Lewis Powell with Judge Bork would tip the Court's balance too much in the conservative direction, the left, led by Senator Ted Kennedy, pulled out all the stops. Eminently qualified for the position, Bork nonetheless made the mistake of thinking that Democrats on the committee, and even some Republicans, were interested in discussing the niceties of constitutional law. Thus, he spelled out his own views in considerable detail, as mentioned earlier. Speaking truth to power, he was voted down, 58-42.

Months later, lessons learned, Judge Anthony Kennedy declined even to discuss *Griswold v. Connecticut*, the 1965 decision overturning the state's criminalization of the sale and use of contraceptives. He was confirmed 97-0. Four years on it was hardly so smooth when Judge Clarence Thomas went before the committee. Again, the left marshaled its forces, now against an African American who believed in natural law—disbelief in which was a charge Chairman Joe Biden had lodged against Bork. Despite Biden's critical discussion of Thomas's writings on natural rights and the emerging libertarian approach to constitutional interpretation, Thomas was narrowly confirmed by a vote of 52-48, with 11 Democrats voting yes, and two Republicans no.

Still, most Republicans continued to play by the old rules. In 1993, Judge Ruth Bader Ginsburg, whose history marked her clearly as a movement liberal, sailed through the Senate, 96-3, as did Judge Stephen Breyer a year later, 87-9. After a long stretch of no Court vacancies, however, it was again the Republicans' turn to make nominations: And again, Democrats on the committee rose to the occasion. The moderately contentious hearings for Judge John Roberts in 2005 led to his confirmation by a somewhat closer vote of 78-22, the 22 all Democrats. The hearings months later for Judge Samuel Alito were so brutal that his wife at one point walked out in tears. Despite his stellar credentials and solid Third Circuit record, he was confirmed by a much narrower vote of 58-42, with only 4 Democrats voting yes.

Perhaps as a sign of Republicans catching on to the game, the Senate votes since have been narrower. In 2009, Judge Sonia Sotomayor was confirmed 68-31, the 31 all Republicans, nine Republicans voting yes. A year later Elena Kagan was confirmed a bit more closely, 63-37, with 36 Republicans voting no, five voting yes. The record to date concludes with the much closer Gorsuch confirmation, 54-45, with all but three Democrats voting no.

Ideological Litmus Tests

Clearly, the trend has been in the direction of increasing polarity along partisan lines. One could say that Democrats have led the way, starting with their opposition to Rehnquist, exploding a year later against Bork. But Democrats will rightly answer that they were responding to the express ideological aim of the Reagan administration to select judges who understood and were part of the growing

conservative and libertarian movements—as evidenced by the administration’s frequent turn to the academy for nominees, not to the American Bar Association. On the other hand, conservatives will answer that they were simply responding to decades of ideological appointments by liberal Democrats aimed at upholding Great Society, New Deal, and Progressive Era programs—held by many conservatives and, especially, libertarians to be inconsistent with the Constitution’s original understanding, notwithstanding claims by liberals about “settled law.”

In the end, therefore, ideology has come to dominate the judicial confirmation process on both sides. Democrats make no effort to disguise it; Republicans sometimes do. Still, there are differences. Identity politics in the courtroom—finding for the “little guy,” for example, when the law does not—is expressly result-oriented. Republicans, by contrast, focus primarily on judicial process, on applying the law, at least as they read it, whatever the result. That point was captured by Judge Gorsuch himself in his opening statement before the committee: “For the truth is, a judge who likes every outcome he reaches is probably a pretty bad judge, stretching for the policy results he prefers rather than those the law compels.”

Concerning those differences, the Democratic view was never more undeniably evidenced than in the aftermath of the 2000 presidential election—driven, no doubt, by the Supreme Court’s split decision in *Bush v. Gore*, which effectively settled the election. For nearly two years the Democrat-controlled Senate Judiciary Committee sat on most of President George W. Bush’s first 11 appellate court nominees (two of those, Clinton holdovers renominated by Bush as a gesture, were confirmed immediately). Among those 11 were such legal luminaries as John Roberts, Jeffrey Sutton, and Miguel Estrada (who never did have a hearing, even after Bush renominated him two years later). It wasn’t quality that concerned the Democrats. It was ideology, and expressly so.

Led by Senator Chuck Schumer, then-chairman of the Judiciary Committee’s Subcommittee on Administrative Oversight and the Courts, now Senate minority leader, Democrats called explicitly for “ideological litmus tests” for judicial nominees. Claiming, not without reason, that judges are and perhaps should be “setting national policy,” their express aim was to keep “highly credentialed, conservative ideologues” from the bench. Schumer was especially

vexed, as he averred in a June 2001 *New York Times* op-ed, by “the Supreme Court’s recent 5-4 decisions that constrain congressional power, probably the best evidence that the Court is dominated by conservatives.” Thus the importance, Democrats said, of placing “sympathetic judges” on the bench, judges who share “the core values held by most of our country’s citizens.” In sum, law aside, it was all politics.

The stall lost steam once Republicans regained the Senate in 2003, but the themes Democrats had pressed in that 107th Congress continue to this day, as a few quotes from the Gorsuch hearings’ opening statements will illustrate. Senator Feinstein, for example, voiced a common note when she said, “Our job is to assess how this nominee’s decisions will impact the American people”—as if a judge should consider the policy implications of a law that, presumably, the legislature has already considered in passing it. Similarly, Senator Patrick Leahy said judges must “consider the effects of their rulings,” then asked, “Will you elevate the rights of corporations over those of real people?” Citing former Senator Paul Simon, Senator Dick Durbin said that history will judge a judge by whether he restricts freedom or expands it, adding, “I don’t mean freedom for corporations.” The Democratic hostility to corporations throughout the hearings was striking. Nearly the whole of Senator Sheldon Whitehouse’s opening statement, for example, was devoted to “cases that pit corporations against humans.” From his statement one imagines that the Court has an abiding hostility toward humans.

Not surprisingly, originalism came in for criticism as well, even if it was often misunderstood. Thus, Senator Feinstein found it “really troubling” that judges should interpret constitutional text in light of the words’ original public meaning, which she thought would mean “that judges and courts should evaluate our constitutional rights and privileges as they were understood in 1789” and “we would still have segregated schools and bans on interracial marriage.” In fact, it was precisely when the words of the Equal Protection Clause were given their original public meaning that those practices could no longer survive. But on this point it was Senator Leahy who truly came up short when he contended that “originalism remains outside the mainstream of modern constitutional jurisprudence.” He seems to have forgotten that it was his question that prompted Elena Kagan, in her hearings, to remark, “We are all originalists.” The alternative,

after all, is to read the text to say what it does not say—what a willful judge might want it to say.

In their statements, questions, and follow-up questions for the record, Democratic members covered the full range of “hot-button” issues—abortion, guns, women’s issues, campaign finance, voting, employment discrimination, environmental regulation, privacy, immigration, LGBTQ issues, administrative law, and more. In each case, however, the interest was far more in the result than in the law that led to it—if at all in that. Senator Amy Klobuchar, for example, took exception to Gorsuch’s suggestion “that the Court should apply strict scrutiny to laws restricting campaign contributions.” So limiting Congress would be “in direct contradiction with the expressed views of the American people,” she said, adding: “While polls aren’t a judge’s problem, democracy should be. When unlimited, undisclosed money floods our campaigns, it drowns out the people’s voices. It undermines our elections and shakes the public’s trust in the process.” Whether true or not—I’m skeptical—such considerations are no part of a judge’s duty. The part of McCain-Feingold at issue in *Citizens United* would have banned certain books and so it had to go pursuant to the law, namely, the First Amendment.

As a final illustration of the Democrats’ thrust at these hearings, a point they made back at the beginning of the Bush 43 years—that judges are and perhaps should be “setting national policy”—was echoed by Senator Al Franken, who remarked that “the justices who sit on the Supreme Court wield enormous power over our daily lives.” Senator Mazie Hirono made that same point: “The Supreme Court shapes our society,” she said. They’re right, of course. But rather than identify the problem that presents for our democracy—that we’re being ruled by the nonpolitical branch—much less address the reasons underlying it—the massive growth of government since the Progressive Era, all of which eventually ends up for decision by the Supreme Court—Democrats want simply to have us ruled by *their* justices—provided these “policymakers” share “the core values held by most of our country’s citizens.”

The best evidence for this comes from the hearings themselves. Recall that what especially vexed Senator Schumer 16 years ago were “the Supreme Court’s recent 5-4 decisions that constrain congressional power,” the very power that over a century and more has given us the Leviathan that today so burdens the Court’s docket. Well that

most fundamental of constitutional issues—whether Congress has the constitutional authority to do all that it has done—barely surfaced in the Gorsuch hearings. In fact, I have found only one mention of the Commerce Clause, through which Congress has given us the modern regulatory state following the New Deal Court’s opening of the floodgates. It is in Senator Mazie Hirono’s subsequent “Questions for the Record.” She raised the issue in connection with *Gonzales v. Raich*, the 2005 California medical marijuana case. Judge Gorsuch declined to respond directly because the answer would turn on particular facts. Perhaps Senate Democrats, especially after the Obamacare litigation, are now so confident that their power to legislate is plenary that the issue is no longer worth raising. But it remains the fundamental reason the battle for the Court today is so intense.

Republicans Respond

For their part, neither did committee Republicans raise the enumerated powers issue, understandably. Their job, after all, was to see the nomination through and hence to raise few problems. Thus, their focus was on criticizing the Democrats’ lines of attack. Senator Orrin Hatch, for example, spoke of the conflict over judicial appointments as being “a conflict over the proper role of judges in our system of government,” going on to draw a sharp distinction between impartial judges, who decide cases on the law, and political judges, who focus on the desired result and then fashion the means toward achieving it. In a similar vein, Senator Ted Cruz noted the “sharp disagreement about the very nature of the Supreme Court.” Judges, he said, “are not supposed to make law. They are supposed to faithfully apply it.” And Senator Mike Lee made a telling political point when he said that “our confidence in the American judiciary depends entirely on judges who are independent and whose only agenda is getting the law right.”

But it was Chairman Chuck Grassley, perhaps anticipating Senator Lee’s point, who set the stage for the hearings with an opening statement that spoke of liberty no fewer than seven times and of the separation of powers no fewer than ten. Thereby getting the law of the Constitution right, perhaps because he is not a lawyer and therefore is less likely to miss the forest for the trees, Grassley made it clear for all to hear that the Constitution’s very purpose, the reason it was written by the Framers and ratified by the people, is to secure liberty.

And the means toward that end, more important even than the Bill of Rights, is found in “the design of the document itself,” he continued. “It divides the limited power of government vertically, between the states and the federal government. And it distributes power horizontally, between the co-equal branches.” With powers thus separated and the branches defined functionally, there is no authority for the political branches to go beyond the limited powers granted to them or the judicial branch to do anything other than say what the law is and apply it.

But because each branch has gone well beyond its allotted powers, venturing thus beyond the law established by the Constitution, what we see today and have seen for many decades is not the politics authorized and bounded by the Constitution but rather a politics unbound by law: a Congress addressing what it will, an executive regulating at will and ignoring legitimate law, and judges too often “doing justice” according to their own lights. Thus, the rule of law is now, to a disturbing extent, the rule of politics, the rule of man, and that bodes ill for liberty. That should concern every American, Republican and Democrat alike.